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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-980

GAETANO DOMINICK VASTOLA, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

ROY M. COHN
MICHAEL ROSEN
39 East 68th Street
New York, New York 10021

Counsel for Petitioner

January 12, 1973

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The petitioner, Gaetano Dominick Vastola, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 24, 1972.

OPINION BELOW

The Court of Appeals for the Second Circuit issued no opinion. Nor did the District Court for the Southern District of New York render any opinion.

The Second Circuit summarily affirmed from the bench, following oral argument, the judgment of conviction that had been entered by the District Court.

That summary affirmance was entered on October 2
1972, and is reprinted in the appendix hereto, p. 1a
infra.

JURISDICTION

On March 24, 1972, after a five-day jury trial, th
United States District Court for the Southern Distric
of New York entered a judgment of conviction an
imposed on the petitioner an imprisonment term
two and one-half years. The judgment followed a jur
verdict finding the petitioner guilty of violating th
Hobbs Act, 18 U.S.C. § 1951.

The Second Circuit summarily affirmed the judg
ment of conviction following the oral argument
October 24, 1972. A timely petition for rehearin
was denied by the Second Circuit on November 1
1972. See the appendix hereto. On timely applicatio
Mr. Justice Marshall signed an order on December
1972, extending the time for filing this petition fo
certiorari to and including January 12, 1973.

The jurisdiction of this Court is invoked under 2
U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an unsuccessful attempt to instill fea
that economic injury will ensue if monetary demand
are not met constitutes an attempt to extort propert
within the meaning of the Hobbs Act, 18 U.S.C. § 195
(b)(2), which outlaws attempts "induced by wrong
ful use of actual or threatened force, violence, or fear."

2. Whether the Government's mid-trial shift in th
theory of a Hobbs Act indictment from one involvin
an extortion by instilling actual fear of economi
injury to one involving an attempted extortion b

unsuccessfully attempting to instill such fear, a shift approved by the trial judge, constitutes (a) an unconstitutional amendment of the indictment, or (b) a variance so substantial as to deprive the defendant of a fair trial.

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part as follows:

> "§ 1951. Interference with commerce by threats or violence
>
> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion or attempts or conspires so to do,* or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, *by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property,* or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced *by wrongful use of actual or threatened force, violence, or fear,* or under color of official right." [Emphasis added.]

STATEMENT OF THE CASE

The petitioner was indicted on three counts, chargi substantive offenses under the Hobbs Act (18 U.S. § 1951) and under the Labor-Management Relatio Act (29 U.S.C. § 186), as well as conspiracy (18 U.S. § 371) to violate both those Acts. But the case again petitioner was submitted to the jury only on the co spiracy count and the count charging a violation of t Hobbs Act.[1] The jury returned a verdict of not guil as to the conspiracy count, but found petitioner guil of the Hobbs Act charge. The District Court thereupo imposed a sentence of two and one-half years impriso ment on the petitioner. The judgment and senten were summarily affirmed by the Second Circuit.

Count 2 of the indictment, which seemingly charge a variety of Hobbs Act violations, including both e tortion and attempted extortion, read as follows:

> "From on or about July 1, 1968 up to and inclu ing the date of the filing of this indictment, in t Southern District of New York, and elsewher GAETANO DOMINICK VASTOLA, a/k/a 'Sonny Va tola', and JESSE SMITH, the defendants, unlawfull wilfully and knowingly did obstruct, delay a affect interstate commerce and the movement carpets therein, and attempted so to do, by exto

[1] The indictment originally named two defendants in thr counts, the petitioner Vastola and one Jesse Smith. Count charged Vastola and Smith and others known and unknown to t grand jury with conspiracy (18 U.S.C. § 371) to violate the Hob Act (18 U.S.C. § 1951) and the Labor-Management Relations A (29 U.S.C. § 186). Count 2 charged Vastola and Smith with su stantive offenses of violating 18 U.S.C. § 1951 and § 2, and Count charged Vastola and Smith with substantive offenses under U.S.C. § 186 and 18 U.S.C. § 2.

The case against Smith was severed prior to trial. Count 3 against Vastola was dismissed on motion of the Government. Th the case against Vastola went to the jury only as to Counts 1 and Vastola was found innocent of the conspiracy charge.

tion, in that they requested, demanded and attempted to obtain amounts of money in excess of $500,000 from Eugene T. Barwick, Buford A. Talley and Barwick Mills, Inc., of Chamblee, Georgia, with their consent, induced by the wrongful use of actual and threatened force, violence and fear, including the threat that unless said amounts of money were paid to the defendants they would cause great economic injury to Barwick Mills, Inc., (1) by causing carpet workers in the New York area to refuse to lay carpets manufactured by Barwick Mills, Inc., and (2) by causing plants of Barwick Mills, Inc. in Georgia to be unionized."

At the commencement of the trial, the Government furnished the District Court and defense counsel with a trial memorandum (App. 16a-17a) that in pertinent part stated: "The Government's theory in this case is that Barwick and its officers were extorted by reason of fear on their part that if they did not go along with Vastola's suggestions, they would suffer economic loss to their business. The law is clear that fear of economic loss comes within the definition of extortion under the Hobbs Act.... In any case under the Hobbs Act, the victim's state of mind is a crucial factor, since extortion cannot exist without the presence of fear." And in the prosecutor's opening statement to the jury it was made clear that Vastola was charged with "extortion" under the Hobbs Act.[2]

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[2] In his opening statement the prosecutor stated:

"In this case the defendant is charged with the violation [of the Hobbs Act] ... which makes it a crime to interfere with interstate commerce by *extortion*, to attempt to interfere with interstate commerce by *extortion*, or to conspire or agree with anybody else to interfere with interstate commerce by *extortion*.

"I have used the term *extortion*. You have heard it. It's a legal term, however." [Emphasis supplied.]

Thus at the outset the true nature of the indictment and of the trial respecting Vastola's alleged violation of the Hobbs Act was made evident by the Government. Vastola was to be charged and tried on the motion that he had obstructed or attempted to obstruct commerce by committing the substantive crime of extortion; and the extortion was deemed to have been effectuated not by force or violence but by the instillation of fear of economic injury, a fear actually instilled in the minds of the Barwick Industries officers. The presence of such fear, as a state of mind, was thought to be crucial to the proof of the charge made by the grand jury, as conceived by the Government in its announced theory of the case.

In summarizing its case before the Second Circuit (Brief, pp. 2-4), the Government asserted that its proof at the trial "established an unsophisticated but blatant attempt on the part of defendant Vastola to extort $500,000 from Barwick Industries, a Georgia carpet manufacturing firm which sold its carpets to wholesalers and retailers throughout the country." The Government's proof was outlined in that brief as follows:

(1) Vastola on two occasions had approached an officer of a retail outlet of Barwick Industries and warned that if the Barwick president, Eugene Barwick, did not meet with him, Barwick carpets would not be laid in New York City.

(2) After Barwick officers were informed of Vastola's statements, they contacted the FBI and, with the FBI's knowledge and approval, the company's president (Eugene Barwick) and vice-president (Buford Talley) traveled to New York to meet with Vastola on November 9, 1968, at a Manhattan restaurant. Others

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were present at this meeting, but Vastola allegedly did most of the talking and told Barwick and Talley that unless Barwick Industries paid Vastola the sum of $500,000, Vastola would see that carpet layers in New York City would refuse to lay Barwick carpets and that this was "nothing more than a shakedown." He claimed that he controlled the carpenters' union, of which the carpet layers' union was a part, throughout the country, and that this was "the beginning of them moving into the carpet industry to take over complete control of it."

(3) At a second meeting with Barwick in New York on November 26, 1968, Vastola was said to have stated that if Barwick paid Vastola $500,000 per year for a three year period, Vastola would prevent Barwick Mills, a non-union plant, from being unionized. Vastola stated that at the time "they" had already started to organize another Georgia carpet plant and also had 10 to 15 organizers working in the Barwick plant. Vastola allegedly explained that he would be saving the company about $1,000,000 per year by protecting it from unionization and that he was entitled to one-half that amount. Vastola stated he wanted $500,000 or a substantial portion thereof in cash immediately.

(4) FBI agents had been assigned to surveil both these meetings and Talley contacted the agents before and after both meetings. In December 1968 Talley informed Vastola through an intermediary that Barwick Industries was not interested in Vastola's propositions and that there was no intention of paying Vastola any money. No money was in fact ever paid to Vastola.

(5) While Vastola did not testify on his own behalf, the Government acknowledged in its brief below that

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the defense witnesses testified that six weeks prior to trial Barwick stated that he had never been threatened by Vastola and that one participant in a lunch with Barwick and Vastola had heard no threats uttered by Vastola. Indeed, the Government's own witnesses indicated that Vastola became very friendly with Barwick and Talley, on a personal and first name basis, during the course of their meetings.

It is immediately evident from the foregoing account of the Government's own case that there was no evidence whatever that any money was actually extorted or obtained by Vastola or that either Barwick or Talley was put in actual fear of economic loss by the statements ascribed to Vastola. Both of those individuals were at all times protected by and under the tutelage of FBI agents and thus fully insulated from any conceivable fears that might otherwise have ensued from the remarks ascribed to Vastola. There was, in short, a complete failure of proof as to the Hobbs Act violation that had been taken from the grand jury's indictment in formulating the Government's theory of the case—i.e., the notion that Vastola was guilty of "extortion" under the Hobbs Act in that "Barwick and its officers were extorted by reason of a fear on their part that if they did not go along with Vastola's suggestions, they would suffer economic loss to their business" (App. 16a).

This unproved theory of the case dominated the presentation of the entire Government case, causing the defense to cross-examine the Government witnesses solely on the supposed issue of whether fear had been instilled in the minds of Barwick and Talley. Then suddenly, after the close of the Government's case, the prosecutor announced a dramatic change in the nature of the Government's theory of the case. Whereas the

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original charge had been that Vastola had in fact instilled in Barwick and Talley a fear of economic loss, the prosecutor began to talk about a charge that Vastola had "threatened the industry" (Tr. 255) and had "made threats" instead of actually instilling fear (Tr. 278). The culmination of this shift in the nature of the prosecution came when the prosecutor remarked to the court (Tr. 273) that

> "... it is not our position that Barwick was at any time actually in fear of being caused economic harm .... [So] it will be a far stretch of imagination that Barwick and Talley were in fear when they met Vastola."

And the prosecutor later repeated (Tr. 346) that

> "There is no question from the Government's proof in this case that the so called victims, Talley and Barwick, were never put in actual fear of any economic harm."

The District Court expressed confusion at this shift in the nature of the case.[3] The court had at first acknowledged that "We have to have at least some fear in this case ... of an economic loss, not fear necessarily in the conventional use of that word, but at least

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[3] The prosecutor, after acknowledging the absence of fear in his statements to the court, as shown above, then deliberately misled the jury by stating in his summation:

> "Basically, [extortion] is obtaining property with the consent of the person who is giving it but through fear on that person. Sure, they are giving it, but they are giving it through *fear*. And Mr. Cohn says there is no fear here ... These is no fear here? What were the FBI doing on this? Why did [Barwick and Talley] contact the FBI November 9, 1968 ... Can you imagine if they were *frightened* then, what did they think when he said [this is nothing more than a shakedown]." Tr. 499-500; emphasis supplied.

fear of an economic loss" (Tr. 255). But when the prosecutor conceded the absence of proof of any such actual fear, the District Court candidly stated that "I must confess my own confusion in view of the statement in your memorandum [App. 16a-17a] ... that you say the victims' state of mind in a Hobbs Act case is a crucial factor ..." (Tr. 374).

The District Court at no time during the trial advised the jury that the entire nature of the alleged Hobbs Act offense had been changed. Nor was any opportunity afforded the defense to cross-examine the Government witnesses on the new notion that Vastola had merely attempted to instill fear.

Not until the charge to the jury did the District Court finally resolve its own confusion. In that charge, the court directed the jury to consider the Government's belated theory that Vastola had merely attempted to instill the fear of economic loss. The Court quite candidly stated that the Government was not charging Vastola with extortion but only with "attempted extortion" and that only the alleged attempt to instill fear should be considered. In pertinent part (App. 24a-25a), the charge read:

> "In this case, the Government is not charging the defendant with extortion but with attempted extortion. And so, once again, we must define an attempt.
>
> "To attempt an offense means to do some act wilfully in an effort to bring about or accomplish something which the law forbids. Mere preparation to commit a crime is not the equivalent of an attempt. The law considers as an attempt those acts which tend to bring about the commission of a crime and which carry the venture so near to com-

pletion that in all likelihood the crime would have taken place but for some interruption.

"The Government contends that the defendant in this case attempted to instill fear of economic loss in Barwick Mills, Inc. and Mr. Barwick and Mr. Talley.

"As I have told you, the statute underlying Count 2 makes an attempt to interfere with commerce by extortion a crime, and I have defined extortion as requiring the wrongful use of fear.

"I now instruct you that in order for you to find defendant guilty beyond a reasonable doubt of attempted extortion you need not find, in this case, that the fear was actually generated in either Mr. Barwick or Mr. Talley, but that it was possible and, indeed, reasonable that fear could have resulted in this case.

"If you find beyond a reasonable doubt that defendant specifically intended to extort money or other property from Mr. Barwick or Barwick Mills, Inc., then you may find the defendant guilty of the crime charged, regardless of whether he was ultimately successful in instilling fear in Mr. Barwick or Mr. Talley.

"Thus, if you believe beyond a reasonable doubt that the defendant specifically intended to obtain a $500,000 payment or any other amount or property from Barwick or Barwick Mille, Inc., with their consent through the use of threats of economic loss or harm, then the essential elements of attempted extortion are satisfied."

It was on the basis of that charge that the jury found the petitioner guilty of an attempted extortion under that Hobbs Act.

REASONS FOR GRANTING THE WRIT

The utter confusion exhibited by the trial judge and the prosecutor as to what crime was involved in the trial of the petitioner Vastola has given rise to several major problems in the administration of criminal justice in the federal courts, and more particularly in the administration of the criminal sanctions of the Hobbs Act, 18 U.S.C. § 1951. Those problems, which fully justify the grant of certiorari, are of two basic natures: (1) the problems concerning the proper interpretation of the Hobbs Act; and (2) the problems arising out of the mid-trial shift in the nature of the charge against the petitioner for which he was on trial.

Needless to say, the Second Circuit's silent and summary affirmance of the conviction has done nothing to resolve those problems or to remove the appropriateness of the grant of certiorari.

I

Important problems are raised as to the proper definition under the Hobbs Act of the crime of an attempt to extort property.

At the core of the confusion in the District Court as to the crime to be ascribed to the petitioner is confusion in the language of the Hobbs Act itself. The Act cannot be described as a model of grammatical perfection, and the necessity for an authoritative ruling by this Court, giving certainty to what is now uncertain, quickly becomes obvious.

The various crimes proscribed by the Hobbs Act are to be found in subsection (a) of § 1951. That subsection provides criminal sanction for anyone who obstructs commerce "by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence ... in furtherance of a plan or purpose to do

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anything in violation of this section." With respect to extortion, this language clearly creates two categories of crimes relevant to the instant case—(1) extortion, and (2) an attempt to extort. And since subsection (b)(2) defines "extortion" as "the obtaining of property from another, with his consent," the distinction between an extortion and an attempted extortion would appear to be the success or lack of success in obtaining property from the extortion victims.[4]

The confusion implicit in the Hobbs Act, however, comes from the effort in subsection (b)(2) to define the means or inducements that necessarily mark the proscribed extortions and attempted extortions. "Extortion," says subsection (b)(2), means the obtaining of property (or an attempt to obtain property) only where the victim's consent is

> "... induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

But do the words "actual or threatened" modify only "force" or do they also modify "violence, or fear"? If only "force" is so modified, then an unsuccessful attempt to instill fear (such as has been conceded to exist in this case) cannot qualify either as an extortion (if money is obtained) or as an attempted extortion (if money is not obtained). If that be the correct reading of subsection (b)(2), then it can be said that Congress did not in fact outlaw attempts to obtain money or property by inducements in the form of empty threats to instill fear, threats that are ignored

[4] Thus, all other considerations aside, it was understandable that, once it became clear that Vastola was unsuccessful in his alleged effort to obtain money from Barwick and Talley, the only charge that could be made against him was one of attempted extortion.

or resisted by the so-called victims.[5] Only where fear is actually induced in the minds of the victims could there then be an attempted extortion induced by fear. Indeed, the Government's original notion of this case (App. 16a-17a) conceded that "the victim's state of mind is a crucial factor, since extortion [under the Hobbs Act] cannot exist without the presence of fear." And the trial judge himself seemed at one point (Tr. 255) to be groping toward realization that "We have to have at least some fear in this case."

On the other hand, some grammatical purists could read "actual or threatened" as modifying "violence, or fear" as well as "force." But had that been the intent of the framers of subsection (b)(2), the intent could more meaningfully have been expressed by writing that the victim's consent must be induced by "the actual or threatened use of force, violence, or fear." Then it would have been clear that a threatened and unsuccessful instillation of fear would be classifiable as an illegal inducement. And the burden of proof in such an event would relate not to the state of mind of the victim but to the intent and purpose of the one who threatened fear.

But subsection (b)(2) itself provides no clue as to which reading is controlling; and the legislative history on the matter appears non-existent. But some

---

[5] One of the basic purposes of the Anti-Racketeering Act of 1934 (48 Stat. 979), from which the Hobbs Act was derived, was to impose criminal sanctions on interferences with commerce by coercive conduct in the nature of extortion. See *United State* v. *Kemble*, 198 F.2d 889, 891 (3rd Cir. 1952). But fear was apparently not considered to be of a sufficient coercive nature to be included in the conduct made unlawful by the Anti-Racketeering Act; the fear concept was added only during the revisions that emerged as the Hobbs Act.

help may be provided by subsection (b)(1), which defines the term "robbery" and the unlawful means of effectuating a "robbery." The listing in subsection (b)(1) of such unlawful means closely parallels the listing in subsection (b)(2) of the unlawful inducements involved in extortions, and may serve to clarify the grammatical construction of subsection (b)(2). These two subsections in pertinent part provide:

Subsection (b)(1)	*Subsection (b)(2)*
"... by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, ..."	"... induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

Grammatically, through the use of the word "or," the listing in subsection (b)(1) more clearly indicates that the "actual or threatened" language modifies only the word "force" and that "violence" and "fear" are used as independent words connoting only completed but not threatened actions. This Court has indicated that "The connotation of a term in one portion of an Act may often be clarified by reference to its use in another." *United States* v. *Cooper Corp.*, 312 U.S. 600, 606-607 (1941). That principle would serve to provide subsection (b)(2) with the greater clarity afforded by subsection (b)(1). And that principle, combined with the traditional requirement of reading criminal statutes narrowly, would compel reading out of subsection (b)(2) any notion that an attempted extortion is punishable if the only inducement involved is an attempt or threat to instill fear of economic injury and that attempt or threat fails.

In any event, the need for clarification of subsection (b)(2) by this Court should now be apparent. The con-

fusing language of that subsection wrought chaos i
the trial proceedings below as judge and prosecuto
belatedly sought to formulate a charge against pet
tioner involving an unsuccessful threat of fear. Th
liberty not only of this petitioner but of all other
accused of attempted extortion by inchoate fear, in
time of burgeoning Hobbs Act prosecutions, is now a
stake. True, most lower courts that have indicated an
awareness of the problem have assumed, without analy
sis, that to "prove a substantive act of attempted ex
tortion [under the Hobbs Act] it is necessary [only]
to prove an attempt to instill fear." *Carbo* v. *United States,* 314 F.2d 718, 741 (9th Cir. 1963). But th
language of subsection (b)(2) itself provides a chal
lenge to such an easy assumption. The time for carefu
analysis and resolution of the ambiguities adhering t
that language has arrived.

It should be noted that the problem here is not one o
determining whether there can be an attempt to instil
fear where success is for some reason rendered impossi
ble. See *Osborn* v. *United States,* 385 U.S. 323, 332-33
(1966). Nor is the problem one of questioning the
power of Congress to provide criminal penalties fo
such an inchoate crime.[6] The problem is simply one o
determining whether Congress has in fact penalized
that kind of activity in the Hobbs Act.

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[6] The criminal law principle is clear enough to the effect that a
attempt to extort is conceptually possible even though the intended
victim is not put in fear. See discussion and cases cited in Wechs
ler, Jones & Korn, The Treatment of Inchoate Crimes in the Mode
Penal Code of the American Law Institute: Attempt, Solicitation
and Conspiracy, 61 Col. L. Rev. 571, 582-583 (1961). But query
whether Congress adopted that principle in its formulation of the
Hobbs Act.

II

Important problems are raised as to whether the indictment was illegally amended, whether there was a substantial variance in proof, and whether there was a fair trial.

The confusion that marked petitioner's trial manifested itself in several ways collateral but related to the statutory construction problem. If petitioner's construction of the Hobbs Act is correct, i.e., that a mere threat of instilling fear, a threat that fails, is not among the inducements outlawed by the Act, not all of these related problems need be answered. The invalidity of petitioner's conviction would be clear enough in that event. But these additional problems are inescapably a part of the confusing and unfair trial to which petitioner was subjected and serve to emphasize the appropriateness of granting certiorari to resolve the statutory enigma.

Count 2 of the indictment in this case generally reflected the ambiguities of the Hobbs Act. It alleged that petitioner knowingly obstructed commerce, "and attempted so to do, by extortion, in that... [he] requested, demanded and attempted to obtain amounts of money in excess of $500,000 from... [Barwick and Talley], with their consent, induced by the wrongful use of actual and threatened force, violence and fear, including the threat [of economic injury if the money demands were not met]." Thus Count 2 can be read as charging obstruction of commerce by actual extortion, as well as an attempt to obstruct commerce by actual extortion. And at least three different kinds of attempts or threats can be found in this allegation: (1) an attempt to obstruct commerce, (2) an attempt to obtain money, and (3) a threat of economic injury.

The Government's trial memorandum and its opening statement to the jury seemed to make it clear that the blunderbuss charge against petitioner was being limited to one of extortion induced by injecting into the victims' minds fear of economic injury. The victims' state of mind was emphasized by the Government as the crucial factor in the case, and it was on that basis and on that representation that the defense prepared its case. Only after the Government rested its case did it announce the abandonment of the original theory of the prosecution; only at that point was it made clear that the victims' state of mind had nothing whatever to do with the case and that the only charge against petitioner was that he had intentionally threatened to instill fear of economic loss as a means for securing his alleged money demands. And only in the final charge to the jury was it made clear that the petitioner presumably had never been charged with actual extortion, but only with attempted extortion. The unfairness of such shifts in the prosecution and in the overt theory of the charge against the petitioner is obvious. The petitioner was deprived of a fair notice of the charge that was to be used against him and of a fair opportunity to develop his defense and to cross-examine the Government witnesses on the basis of the belated charge.

Moreover, if the Government's original attempt to limit the charge to one of actual extortion be given credence and effect, the subsequent alteration and transformation of the charge into one of attempted extortion by means of an unsuccessful threat of fear raise problems of a constitutional and jurisdictional stature. The decisions of this Court in *Ex parte Bain*, 121 U.S. 1 (1887), *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749,

770-771 (1962), have established that no indictment may be amended or altered except by resubmission to the grand jury. No prosecutor or judge has power in the midst of a trial to announce a change in the nature of the case or to alter that which has been set by the grand jury's indictment. And no court has jurisdiction to try a defendant on such an altered charge or to render any judgment in the matter. *Ex parte Bain, supra.* Moreover, the variance in proof that inevitably accompanies these alterations in the grand jury's charges can be so substantial as by itself to indicate that an impermissible amendment of the indictment has occurred. *Stirone* v. *United States, supra.* Respect for those established principles, which are designed to protect a defendant's Fifth Amendment right to be held to answer only to the precise charges made by a grand jury, requires that the instant proceeding be carefully examined to see if that constitutional right has been fully protected. Such an examination is particularly appropriate where the alteration made by the prosecutor and judge may have resulted in a charge and a conviction for a crime never articulated by Congress in the Hobbs Act.

In the circumstances of this case, the confusion in the language of the Hobbs Act has been compounded by the erratic maneuvers of prosecutor and judge in changing the nature of the Hobbs Act charge against the petitioner. The result has been a conviction for a crime either not alleged by the grand jury or not outlawed by the Hobbs Act. The constitutional concepts here involved do not permit such an egregious error to be ignored in terms of waiver, harmless error or lack of prejudice. *Stirone* v. *United States,* 361 U.S. at 217.

Of certiorari relevance is the fact that the Second Circuit has recently shown a persistent refusal to consider or to implement the constitutional doctrine embodied in the *Bain* and *Stirone* decisions respecting prosecutorial and judicial amendments of indictments. See also *Milton Silverman* v. *United States,* a petition for certiorari to be filed shortly hereafter, involving this same insensitivity of the Second Circuit to claims of this nature. Respect for the constitutional doctrine at stake fully warrants review of the Second Circuit's unarticulated and unexplained rejection of the claim in this case.

CONCLUSION

For these various reasons, the judgment of the Court of Appeals for the Second Circuit should be reviewed upon a grant of this petition for writ of certiorari.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

ROY M. COHN
MICHAEL ROSEN
39 East 68th Street
New York, New York 10021

Counsel for Petitioner

January 12, 1973

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1491

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and seventy-two.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays, Hon. William H. Mulligan, Circuit Judges.

United States of America, *Plaintiff-Appellee,*

v.

Gaetano Dominick Vastola, a/k/a "Sonny Vastola" and Jesse Smith, *Defendants,*

Gaetano Dominick Vastola, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

[seal]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1491

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-two.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays, Hon. William H. Mulligan, Circuit Judges.

United States of America, *Plaintiff-Appellee,*

v.

Gaetano Dominick Vastola, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

A. Daniel Fusaro
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-980

GAETANO DOMINICK VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner questions whether the unsuccessful efforts to induce fear of economic injury is sufficient to support a Hobbs Act attempted extortion prosecution and whether the government improperly shifted its theory of the case at trial.

After a five day jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of an attempted extortion in violation of 18 U.S.C. 1951 and was sentenced to two and one-half years' imprisonment. The scheme involved an attempt to extort $500,000 from a national carpet manufacturer on the threat that, if the company did not "pay off," petitioner would see to it that its carpets could not be

installed in the New York City area.[1] The court of appeals summarily affirmed from the bench. 468 F. 2d 632.

1. Petitioner argues first that the evidence established an attempt to extort funds by the threat of economic injury, which did not succeed because of his failure actually to "instill fear" in his victim. Such conduct, petitioner claims, does not come within the meaning of 18 U.S.C. 1951, which makes it an offense to attempt to extort property "by wrongful use of actual or threatened force, violence, or fear * * *." This argument, which petitioner candidly acknowledges has been generally rejected by the courts that have considered it (Pet. 16)[2], is contrary to the plain language of the Hobbs Act as well as to the traditional "criminal law principle" (Pet. 16, n. 6) that a criminal attempt to extort can be committed even if the victim is not actually put in fear. Petitioner's contrary argument was properly rejected by the court of appeals, and does not warrant further review.

2. Petitioner's claim that the indictment was illegally amended when the United States Attorney allegedly shifted his theory of the case "from one involving an extortion by instilling actual fear of economic injury" to one "involving an attempted extortion by unsuccessfully attempting to instill such fear" (Pet. 2-3) lacks foundation in the record. The indictment expressly alleged that petitioner and his accomplices "did obstruct, delay and

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[1]There can be no contention that the demands in this case were made in the context of a labor-management dispute seeking higher wages for services desired by the employer. Thus the recent decision in *United States* v. *Enmons*, No. 71-1193, decided February 22, 1973, is not applicable.

[2]*United States* v. *Pranno*, 385 F. 2d 387, 389 (C.A. 7), certiorari denied, 390 U.S. 944; *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 393; See, also, *United States* v. *Green*, 350 U.S. 415, 417, 421.

affect interstate commerce * * * by extortion, in that they requested, demanded and *attempted* to obtain amounts of money in excess of $500,000 * * * by wrongful use of actual *or threatened force, violence and fear*"[3] (Pet. 4-5; emphasis added). The proof upon which petitioner was convicted clearly supports "the indictment which was found by the grand jury" (*Ex parte Bain*, 121 U.S. 1, 9-10)[4].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[3]The indictment then goes on to allege with particularity the "threat" of economic coercion employed by petitioner and his accomplices.

[4]Petitioner's vague and unsubstantiated claim that he was deprived of a "fair opportunity to develop his defense, and to cross-examine the Government witnesses" (Pet. 18) is without merit. The indictment specified in great particularity the nature of the threats employed (Pet. 4-5). Whether fear was actually instilled in petitioner's victims was not under any circumstances a defense to the crime, and petitioner had an ample opportunity—if he so desired—to recall any witness for further cross-examination.